SUPREME COURT OF APPEALS OF WEST VIRGINIA

MATTHEW WYSONG,
by his mother, Mary L. Ramsey,

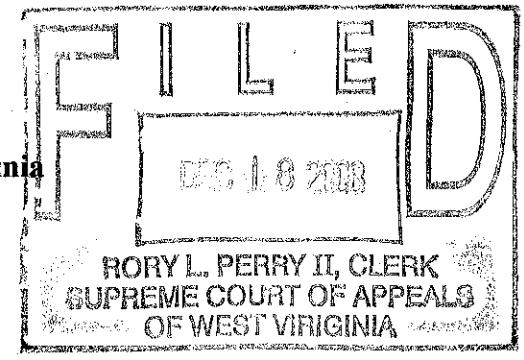
Petitioner Below, Appellee,

Vs.)

Supreme Court No. 34594
(Kanawha Co. Civil Action 07-AA-152 Below)

MARTHA WALKER, in her official capacity as Secretary of the West Virginia Department of Health and Human Resources; and Ray Burl Woods, in his capacity as State Hearing Officer for the West Virginia Department of Health and Human Resources,

Respondents Below, Appellants.



BRIEF OF APPELLANT MARTHA WALKER, SECRETARY, WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES

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I. Kind of Proceeding and Nature of Ruling Below

Martha Walker, Secretary of the West Virginia Department of Health and Human Resources ("DHHR"), appeals from a final Order of the Circuit Court of Kanawha County (J. Bloom), entered April 7, 2008, which reversed a final decision of the Board of Review of the DHHR that had affirmed a determination by the Bureau for Medical Services ("BMS", "State Medicaid Agency") that Matthew Wysong failed to demonstrate, in the materials submitted with his application for benefits and after a hearing *de novo*, that he meets the medical eligibility requirements for participation in the Medicaid Home and Community Based Mentally Retarded/Developmentally Disabled Waiver Program ("MR/DD Waiver Program").

DHHR asserts one assignment of error that encompasses multiple transgressions committed by the Circuit Court: DHHR asserts that the Circuit Court committed error, as a matter of law, in creating an improper standard for medical eligibility determination in reviewing

the State Hearing Officer's Findings of Fact and Conclusions of Law. An "independent review" requires that the Circuit Court must first know the legal standard for medical eligibility that applies to the evidence which it is reviewing. The Circuit Court in this case did not do an "independent review" because in making its determination, it was not reviewing evidence but creating it. The end result was a standard so liberal that anyone with a listed diagnosis would qualify for the program without the necessity of meeting the statutory requirements of severity, functionality and level of care. This is a recurring error in the Circuit Court that has escaped judicial review and negatively impacts the MR/DD Waiver Program.

Secretary Walker seeks reversal of the April 8, 2008 Order and reinstatement of the Board of Review's decision upholding the denial of Mr. Wysong's application for the MR/DD Waiver Program.

II. Statement of Facts

In June, 2006, Matthew Wysong, age 24, a Medicaid recipient, applied for participation in the MR/DD Waiver Program. The MR/DD Waiver Program is a joint federal-state program established by Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.* (2000). It allows the State to offer the services and level of care provided in an Intermediate Care Facility for individuals diagnosed with mental retardation and/or related developmental disabilities (an "ICF/MR") to eligible individuals in their homes and communities instead of an ICF/MR. The State is authorized to provide these services only to Medicaid recipients who the State Medicaid Agency determines would, in the absence of these services, require Medicaid covered level of care provided in an ICF/MR. 42 U.S.C. § 1396A(c) (1); 42 CFR § 441.301(b) (1) (iii) (2000),

42 C.F.R. §§1010 (July 12, 2006)[1], 483.440(1995); Chapter 500, §503.1, *WV Medicaid MR/DD Waiver Policy Program Manual, (BOR Hrg. Exh. 12). See also, Medicaid Letter Number 97-10, Guidelines Regarding What Constitutes an ICF/MR Level of Care Under a Home and Community-Based Services Waiver (March 10, 1997)(*providing that the level of care requirements for medical eligibility for placement in ICF/MR and participation in MR/DD Waiver Program are the same)(Exh. A, attached to DHHR's Cir. Ct. Mem.*)*

Wysong has never been a participant in the MR/DD Waiver Program. Nor has he been a resident in an ICF/MR. He can read and write, lives at home with his mother and acts as his own guardian. He attended public school through the eighth grade in "Mild Impairment" classrooms in Virginia and West Virginia, was home-schooled from the ninth grade to eleventh grade and participated in vocational training through WV Rehab in Institute, West Virginia, with "some success." He was employed at Goodwill Industries through WV Rehab in 2002 but is not currently employed. *BOR Hrg. Exhs. 7, 8, "Psychological Evaluation" and "Social History".*

Documents submitted with his application include the "Annual Medical Evaluation" ("DD-2A"), a "Psychological Evaluation" dated March 9, 2006 ("DD-3A") a "Social History" and Individual Program Plan ("IPP") from Arc of West Virginia, a Medicaid provider of behavioral health services.[2] *BOR Hrg. Exhs. 6 -10.*

The Annual Medical Evaluation ("DD-2A"), completed by Dr. Baker, D.O., states that Wysong has a diagnosis of "Cerebral Palsy – lacks coordination; Seizure Disorder – Attention Deficit Disorder, Excessive Cognitive Disorder – OCD" and that his prognosis is "Guarded." *BOR Hrg. Exh. 6.* It also notes that Wysong is ambulatory but "needs assistance after seizures," is continent and fully capable of feeding himself. In the area of personal hygiene, he is reported

[1] Previously designated as 42 C.F.R. §1009 (1994).
[2] Wysong has a Medicaid card which provides him with access to behavioral health services.

to be independent and capable of self-care but "needs assistance" in that he is "unable to complete self care – after taking a shower; unable to use clothing with buttons; can't cut nails and comb hair, *etc.*" *Id. at 3.* Under the related area of mental and behavioral difficulties, he is reported to be "alert." Dr. Baker checked a box stating that Wysong requires treatment at an ICF/MR level of care. *Id.*

The psychological evaluation (the "DD-3A"), signed by Sandi Kiser-Griffith, M.A., Licensed Psychologist, provides a diagnostic impression on Axis I of "294.9 Cognitive Disorder NOS."[3] *BOR Hrg. Exh.7 at 6.* It also provides the results of various current and earlier psychological tests administered to Wysong. On the Kaufman Brief Intelligence Test, Wysong obtained a Verbal Standard Score of 74, a Non-Verbal Standard Score of 80 and a Composite IQ Standard Score of 73. These scores were compared with previous scores and were determined by the evaluating psychologist to be "an accurate reflection of his true ability" and **did not** support the presence of mental retardation. *Id. at 5.*

The psychological evaluation includes an assessment called the Adaptive Behavior Scale – Residential and Community: Second Edition ("ABS-S: 2"). Ms. Kiser-Griffith utilized mental retardation norms in her assessment, notwithstanding that Wysong is not mentally retarded. The ABS scores were, for the most part "average." The scores associated with the life activities of mobility, expressive and receptive language, learning and self-care were above the 75th percentile when compared to MR normative populations. Wysong scored "superior in the areas of language, numbers, time and "above average" in responsibility. *BOR Hrg. Exh. 9; see also, 8-01-07 TR 18, 23, 30, 34.*

Section V, "Summary," of the psychological evaluation provides as follows:

[3] "NOS" means "not otherwise specified."

Indicate the individual's level of acquisition of these skills commonly associated with the need for active treatment.

1. Able to take care of most personal care needs.	Yes.
2. Able to understand simple commands.	Yes.
3. Able to communicate basic needs and wants.	Yes.
4. Able to be employed at a productive wage level without systematic long term supervision or support.	No.
5. Able to learn new skills without aggressive and consistent training.	Yes.
6. Able to apply skills learned in a training situation to other environments or settings without aggressive or consistent training.	Yes.
7. Able to demonstrate behavior appropriate to the Time, situation, or place without direct supervision.	Yes.
8. Demonstrates severe maladaptive behavior(s) which place the person or others in jeopardy to health and safety.	No.
9. Able to make decisions requiring informed consent Without extreme difficulty.	No.
10. Identify other skill deficits or specialized training needs which necessitates the availability of trained MR personnel, 24 hours per day, to teach the person to learn functional skills.	No.

The Psychological Report, signed by Ms. Kiser-Griffith, **does not** recommend active treatment at the level of care and services provided in an intermediate care facility for individuals with mental retardation or "related conditions" ("ICF/MR") in the DD-3 as required by State and federal law for certification to the MR/DD Waiver Program. *BOR Hrg. Exh. 7*; *see also, 8-1-07 BOR TR 45-46.*

Wysong's application was initially denied upon a record review. Specifically, in the "Notice of Denial" dated June 16, 2006, *BOR Hrg. Exh. 5*, the DHHR stated that:

> While Mr. Wysong carries the potentially eligible diagnosis of Cerebral Palsy and seizure disorder, the Waiver Manual requires that these related conditions must be severe to meet the eligible criteria. Documentation submitted to date does not support that Mr. Wysong's condition is severe as he is ambulatory, expresses himself through language, and can perform basic self-help activities.

> The presence of substantial adaptive deficits in three or more of the six major life areas considered for eligibility is not supported within the documents submitted for review. Also, the psychological evaluation does not indicate a need for active treatment (Section V).

Upon Wysong's request, a Fair Hearing was scheduled for October 27, 2006; however, it was continued numerous times by his counsel. *BOR Hrg. Exhs. 15 -19.* A hearing was commenced on May 31, 2007 before State Hearing Officer Ray Woods; however, after the testimony and cross-examination of DHHR's witnesses, upon Wysong's motion, it was continued to August 1, 2007 to allow him the opportunity to present testimony from his evaluating psychologist (Sandi Kiser-Griffith). *5-21-07 BOR TR 18-19.*[4]

At the May 31, 2007 hearing, Steven Brady, Operations Coordinator for the Title XIX, MR/DD Waiver Program, testified that medical eligibility for the MR/DD Waiver Program has four parts; namely, (1) eligible diagnosis, (2) functionality, (3) need for active treatment (4) at the level of care and services provided in an ICF/MR. Thereafter, upon stipulation of the parties, the WV Medicaid Policy Criteria defining and describing the medical eligibility requirements was admitted into evidence. *See BOR 5-31-07 TR at 5; Hrg. Exh. 12.*

In a nutshell, the Policy and underlying federal regulations provide that the documentation submitted on behalf of the applicant must demonstrate (1) a diagnosis of mental retardation and/or a related developmental disability "other than mental illness" that is "severe and chronic;" (2) the eligible diagnosis manifested before the person reaches age 22; (3) is likely to continue indefinitely and (4) "results in substantial functional limitations" in three or more of the major life activities of self care, understanding and use of language, learning, mobility, self-direction and capacity for independent living. *Id. See also*, 42 U.S.C. §435.1010 (2006).

The Policy further provides that:

[4] Nisar Kilwar, Assistant Attorney General, now deceased, represented the DHHR at the BOR Hearings.

> Substantial limits is defined on standardized measures of adaptive behavior scores three (3) standard deviations below the mean or less than 1 percentile when derived from non MR normative populations or in the average range or equal to or below the seventy fifth (75) percentile when derived from MR normative populations. The presence of substantial deficits must be supported by the documentation submitted for review, i.e., the IEP, Occupational Therapy evaluation, narrative descriptions, etc.

Linda Workman, a licensed clinical psychologist and licensed school psychologist, with 25 years experience, contracted by BMS to make eligibility determinations for the Bureau and provide other services, testified on behalf of DHHR/BMS as an expert witness in the area of psychology, psychological testing, treatment and the level of care and services provided in an ICF/MR setting. *5-31-07 TR 6, 9.* Ms. Workman has been involved in the certification of more than 4000 individuals for the MR/DD Waiver Program in West Virginia. *Id. at 18.*

Ms. Workman testified that the Annual Medical Evaluation (DD-2A), submitted on behalf of Wysong, established a potentially eligible diagnosis -- i.e., Cerebral Palsy and seizure disorder[5] -- for the MR/DD Waiver Program as a "related condition," that it manifested before the age of 22 and was expected to continue indefinitely. *5-1-07 TR 10-11.* However, she opined that the documents submitted with Wysong's application and subsequent thereto do not indicate that Wysong's cerebral palsy is "severe."

Ms. Workman explained that, the DHHR, in assessing the level of severity with regard to cerebral palsy, looks at what part of the body is involved, the degree of utilization in ability to ambulate, perform self-care, communicate, etc. and looks for problems requiring special care. *5-31-07 TR 7-8.* Workman testified that individuals with severe cerebral palsy, a disorder of muscle power and coordination due to damage to the brain, in the context of Title XIX of the Medicaid Act, are:

[5] The Psychological Evaluation includes a medical history which indicates that Wysong was born prematurely with a low birth weight and, at eight months of age, experienced his first seizure and a high fever. *BOR Hrg. Exh. 7 at 2.*

> typically, spastic, quadriplegic. They are not mobile. They reside in wheelchairs. They are unable to transfer from bed to wheelchair to toilet. They in many cases, are unable to feed themselves. Mobility is severely impacted and often times language is also severely impacted because articulation is very difficult because of the level of their cerebral palsy...

Id. She stated that the documentation indicates that Wysong has some impairment in mobility but it is not "severe" as it is reported that he is independently ambulatory and has sufficient fine motor ability to take care of most activities of daily living, and is able to express his needs and wants. *Id. at 7-8.* She noted that, "even with cerebral palsy, Matthew's higher score [on the Kaufmann Brief Intelligence Test] was in the section that requires him to be able to manipulate fine motor activities, the nonverbal section that requires eye-hand coordination." *Id. at 10.* Workman also pointed out that Wysong's evaluating psychologist **did not** recommend an ICF/MR level of care for treatment for functional limitations attributed to his cerebral palsy. *Id. at 11, 14.*

Ms. Workman further testified that, while Wysong's ABS scores for some of the major life activities fell within the eligible range using MR norms, the narrative notes of the treating physician, examining psychologist and the social history data **do not** support the presence of substantial functional limitations in three or more major life activities resulting from cerebral palsy, as required by the State Medicaid Policy Manual for the MR/DD Waiver Program. *Id. at 10- 14.*

In addition, Ms. Workman testified that Wysong **does not meet** the criteria of "continuous active treatment" at the ICF/MR level of care for adaptive deficits attributed to an eligible diagnosis. First, Wysong's evaluating psychologist **did not** recommend an ICF/MR level of care for treatment for deficits attributed to his diagnosis of cerebral palsy. *Id. at 11, 14.* Second, Wysong's examining psychologist, in her report, only identified one major life activity

where training was recommended (i.e., the area for independent functioning). Third, Section V of the psychological report indicates that Wysong **does not have any deficits** that necessitate the availability of trained MR personnel 24 hours a day to teach him to learn functional skills. Workman testified that an individual who meets the eligibility criteria for the MR/DD Waiver Program requires the intermediate institutional level of care that provides "twenty-four hour intervention and support." *Id. at 8, 11.*

Ms. Sandi Kiser-Griffith, a licensed psychologist, testified on behalf of Wysong at the August 1, 2007 hearing regarding her March 6, 2006 evaluation of Wysong. She stated that this evaluation was the only time she had ever interacted with Wysong. *8-1-07 TR 9.* She deferred to the treating physician on the issue of physical diagnosis (i.e., cerebral palsy and seizure disorder). *Id.* She admitted that Wysong's impairment in mobility due to cerebral palsy was "not severe." *Id. at 34.*

Regarding the psychological diagnosis, Kiser-Griffith opined that Wysong suffers from a personality disorder, not otherwise specified ("PD/NOS") and that he manifested this condition prior to age 22. *Id.* She testified that Wysong's intellectual functioning is "borderline mental retardation."[6] *Id. at 10.* Ms. Kiser-Griffith opined that Wysong has "deficits" in all six of the major life areas and would benefit from training programs designed to increase his effort and abilities in domestic activities, vocational activities and social engagement; however, the focus of her testimony was Wysong's personality disorder. *Id. at 33-34.*

On cross-examination, Kiser-Griffith admitted that psychometric data does not indicate that Wysong's level of functioning is three standard deviations below the mean; rather, they indicate that his overall functioning is above the 75th percentile for MR normative populations.

[6] "Borderline mental retardation" indicates an intellectual level of functioning in the 71 – 84 range. §V62.89, DSM-VI-TR (4th Ed. 2000) at 740; *BOR Hrg. Exh. 7 at 5.*

Id. at 30. Moreover, she admitted that her use of MR norms in assessing Wysong's scores on the ABS was questionable and indicated that little weight, if any, should be given to Wysong's functional assessment based on the ABS utilizing MR norms.[7] *Id. at 38 – 39.* She stated that she had used MR norms to assess Wysong because the ABS does not have non-MR norms for adults. *Id.*

> If they do – you can compare a child with a child who doesn't have MR, but that's the child version of it. They don't have a version where you can compare adults, which they should because *I don't know what good it does to compare one person with mental retardation to another [without mental retardation].*" *Id.* (emphasis added).

Importantly, Kiser-Griffith **did not** testify that the deficits for which she recommended training resulted from mental retardation, cerebral palsy or a developmental disability that is closely related to mental retardation. PD/NOS is **not** a developmental disability that is closely related to mental retardation for purposes of the WV Medicaid MR/DD Waiver Program. *BOR Hrg. Exh. 12.*; 42 C.F.R. §435.1010 (2006). *See also*, §301.9, DSM-IV-TR (4th Ed. 2000) at 729 (PD/NOS includes general diagnostic criteria for a Personality Disorder on p. 689), 689, subpart F.[8]

Regarding Section V of the Psychological Evaluation, Ms. Kiser-Griffith admitted that most of her answers were based on the need for prompting and/or supervision rather than to learn new skills. *Id. at 19, 27.* Moreover, she admitted that the training she recommended for Wysong **does not** translate into a need for ICF/MR services at an ICF/MR level of care. *Id. at 46:*

> Q: Being a layman, to help me to understand how any of this would translate that [training] should be received in an ICF/MR level of care.

[7] The ABS-S:2 was standardized on two groups. For the MR (mental retardation) sample, 2074 school-aged students with mental retardation residing in 40 states (including West Virginia) were evaluated with the scale. For the non-mental retardation sample, 1,254 students residing in 44 states (including West Virginia) were evaluated using the scale. The MR sample group includes ages 3 – 21; the non-MR sample group, ages 3 – 18.

[8] Criteria numbered "F" provides that "The enduring pattern is not due to the direct physiological effects of a substance (e.g., a drug of abuse, a medication) or a general medical condition (e.g., head trauma).

A: It doesn't...

And she admitted that she **did not** recommend treatment for Wysong at an ICF/MR level of care based upon her March 9, 2006 evaluation. *Id. at 45 – 47:*

> Q: Now the policy, the MR/DD policy states under "Active treatment," "Requires and would benefit from continuous active treatment.
>
> A: Right.
>
> Q: Again, I emphasize Ms. Workman indicated there was no recommendation.
>
> A: Uh-huh (yes).
>
> Q: Is there anything in your recommendations that would indicate that?
>
> A: I see what you are getting at, I think. *No*, I'm saying that he needs – these are his training needs, these are his support needs, *but that is correct.* Because his diagnosis does not cleanly fall into that category, then *we did not make a specific recommendation that it had to be like ICF or through waiver or whatever. (emphasis added).*

Hearing Officer Woods found that Wysong did not meet the medical eligibility criteria and affirmed the BMS' decision to deny him participation in the Program. He determined that Wysong has an eligible diagnosis of cerebral palsy and seizure disorder, but that he failed to meet the functionality and level of care criteria; specifically, Wysong failed to demonstrate substantial limited functioning resulting from cerebral palsy in three or more major life areas that require continuous active treatment for services and level of care provided at an ICF/MR. *BOR Hrg. Exh.1.*

Thereafter, Wysong appealed the Board of Review Decision with the filing of a *writ of certiorari* in the Circuit Court of Kanawha County. The Circuit Court did not take additional evidence. The case was submitted upon briefs of the parties. Following argument, the circuit court reversed and remanded with instructions to place Wysong in the MR/DD Waiver Program.

In so doing, the Circuit Court held that Wysong has an eligible diagnosis of cerebral palsy as a "related condition," that his cerebral palsy is "severe," "chronic," that it manifested before the age of 22, that he has substantial functional limitations in the life areas of capacity for independent living, self-direction and self-care, and that he requires "active treatment" at the level and care of services provided in an ICF/MR. DHHR appeals from the Circuit Court's determinations that Wysong demonstrated his cerebral palsy is "severe" and that he meets the functionality and level of care requirements for participation in the MR/DD Waiver Program.

III. Assignment of Error

The Circuit Court Committed Error, As A Matter Of Law, In Creating An Improper Standard For Medical Eligibility Determination In Reviewing The State Hearing Officer's Findings of Fact And Conclusions of Law.

IV. Standard of Review

"In cases where the circuit court has amended the result before the administrative agency, [the Supreme Court of Appeals] reviews the Final Order of the circuit court and the ultimate disposition by it of an administrative law case under an abuse of discretion standard and reviews questions of law *de novo*." Syl pt. 1, *Helton v. REM Community Options, Inc.*, 218 W. Va. 165, 624 S.E.2d 512 (2005) (citing Syl pt. 2, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996)).

The *de novo* standard of review applies to this appeal because the assignments of error concern the legal requirements of eligibility and the scope of the standard of review of an administrative decision which are pure questions of law. *Id.*

Inasmuch as the Secretary of the WV DHHR, pursuant to State and Federal laws and regulations, has the sole discretion to create, administer and interpret the Medicaid Program, and

because the Circuit Court decided this case upon the administrative record without taking any new evidence, the findings of the State Hearing Officer should be upheld unless clearly erroneous. Otherwise, the court would violate the Separation of Powers Doctrine, *W.Va. Const., Art. V, § 1. Frymier-Halloran v. Paige*, 193 W.Va. 687, 458 S.E.2d 780 (1995); *Danielley v. City of Princeton*, 113 W.Va. 252, 167 S.E. 620 (1933). *Accord, State ex rel. Prosecuting Attorney of Kanawha County, West Virginia*, 2008 WL 4867218 at 9, ftn. 17, (W.Va. November 5, 2008).

V. Discussion and Points of Authority

The State Hearing Officer's decision was before the Circuit Court upon a writ *of certiorari*. The scope of the reviewing court, on a *writ of certiorari*, is "an independent review of both, law and fact, as justice may require." *Adkins v. Gatson*, 218 W. Va. 332, 624 S.E.2d 769 (2005) *citing Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982).

"Independent" and "review" must be read in *pari materia*. Justice requires that the Circuit Court must first know the legal standard that applies to the evidence which it is reviewing. *Harrison v. Ginsberg*, 169 W.Va. at 167-71, 286 S.E.2d at 279-81 (Holding that the finder of fact must review the evidence in the manner required by state and federal law and under the standards set out in pertinent state and federal laws.) From the onset, the Circuit Court committed error because it applied the wrong standard for medical eligibility. The Circuit Court's decision is analogous to taking a journey without using a road map and making a wrong turn; the farther along you go, the more lost you get. The more the Circuit Court used the wrong standard, the more erroneous its opinion became. Error was piled upon error. The end result was such a liberal standard that anyone with a listed diagnosis can qualify for the MR/DD

Waiver Program without the necessity of meeting the severity, functionality and level of care requirements required by State and federal law.

The WV MR/DD Waiver Program

Medicaid is purely a statutory creature. *Grayam v. Department of Health and Human Resources,* 201 W.Va. 444, 498 S.E.2d 12 (1997). A court construing a statute should read the words of the statute in context, as part of the overall statutory scheme. *Id. See, also, Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1227 (10th Cir. 2007), *State ex rel. Morgan v Trent,* 195 W.Va. 257, 263, 465 S.E.2d 257, 263 (1995); *Smith v. State Workmen's Compensation Commission,* 159 W.Va. 108, 219 S.E.2d 361 (1975).

Also, deference should be given to the federal agency charged with administering the Medicaid statute (CMS). *Hobbs v. Zenderman*, 542, F.Supp.2d. 1220, 1228 (2008), citing, *Morenz v. Wilson-Coker*, 415 F.3d 230, 235 (2d Cir. 2005)("interpretations of complex Medicaid statute by federal agency charged with administering the statute are given "respectful consideration" at the least, and are often accorded a "significant measure of deference").

Courts are required to take judicial notice of the Medicaid regulations set forth in the Code of Federal Regulations. 42 U.S.C. §1507, 42 U.S.C. §1510. *Accord, Ginsberg*, 169 W.Va. at 167, 286 S.E.2d at 280 (holding that "it is axiomatic that the manner in which a state administers a federal assistance program must be consistent with federal law").

The MR/DD Waiver Program is a joint federal-state program established by Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.* (2000). It is an optional program under Medicaid. 42 U.S.C. §1396d (a) (15). It depends on federal funding.[9] With limited resources, it is limited in the number of individuals it can serve. *Hern v. Beye*, 57 F.3d 906, 911 (10th Cir.

[9] The current federal participating share ("FFP") is 74.5%

1995). Currently, there are approximately 4100 individuals who have been certified as medically eligible to participate in the program.

Federal law places conditions on States that choose to participate in Medicaid. *See* 42 C.F.R., Part 430, *Grants to States for Medical Assistance Programs*. Each participating state is given some flexibility in devising its Medicaid program, [10] but the State's plan must be approved by the federal Centers for Medicare and Medicaid Services ("CMS"). [11] 42 U.S.C. § §1396a, 1396a (1); 42 C.F.R., Subpart A, §430.0; 42 C.F.R. § 430.10. "If the state plan does not meet Federal Requirements or if the program is not administered in compliance with the Federal Requirements, the state may lose federal funds for the program." 42 U.S.C. § 1396c. *Prestera*, 111 F. Supp. 2d 768, 773 (S.D. W. Va. 2000).

Title XIX affords states great latitude in determining the scope and extent of coverage of medical assistance. *See, Roe v. Norton,* 522 F.2d 928, 933 (2d Cir.1975). That latitude is limited by federal law. Title XIX requires that the plan "include reasonable standards ... for determining eligibility for .... medical assistance under the plan which ... are consistent with the objectives of this subchapter." 42 U.S.C. § 1396a(a)(17).

The West Virginia Legislature, *W.Va. Code* § 9-2-3 (1970), agreed to accept federal appropriations and other assistance by the WV DHHR "in accordance with the provisions of this Chapter and the conditions imposed by applicable federal laws, rules and regulations." *Ginsberg,* at 169 at 167, 286 at 280.

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[10] "Within broad Federal rules, each State decides eligible groups, types and range of services, payment levels for services, and administrative and operating procedures." 42 C.F.R., Subpart A, §430.0.

[11] "The State plan is a comprehensive written statement submitted by the agency describing the nature and scope of its Medicaid program and giving assurance that it will be administered in conformity with the specific requirements of title XIX, the regulations in this Chapter IV, and other applicable official issuances of the Department..." 42 C.F.R. §430.10.

The West Virginia Legislature gave the Secretary of the West Virginia Department of Health and Human Resources the sole authority to decide eligibility groups, types and range of services, payment levels for services, and administrative and operating procedures, including adjudicatory decision making. *W.Va. Code* § 9-2-6 (2005), in pertinent part, provides:

> Within limits of state appropriations and federal grants *and subject to provisions of federal and state laws and regulations,* the Secretary, in addition to all other powers, duties and responsibilities granted and assigned to that office in this chapter and elsewhere by law, is authorized and empowered to:
>
> ....
>
> (2) Promote, amend, revise and rescind department rules and regulations respecting qualifications for receiving the different classes of welfare assistance consistent with or permitted by federal laws, rules and regulations, but not inconsistent with state law...
>
> ....
>
> (12) Provide by rules such review and appeal procedures within the department of human services as may be required by applicable federal laws and rules respecting state assistance, federal-state assistance and federal assistance and as will provide applicants for, and recipients of all, classes of welfare assistance an opportunity to be heard by the Board of Review, a member thereof, or individuals designated by the Board, upon claims involving denial, reduction, closure, delay or other action or inaction pertaining to welfare assistance.

The Bureau of Medical Services ("BMS") within the West Virginia DHHR and is the single state agency which administers and interprets the WV Medicaid MR/DD Waiver Program. 42 C.F.R. § 431.10 (1979).

The MR/DD Waiver Program allows the State to offer the services and level of care provided in an "ICF/MR" to eligible individuals in their homes and communities as an alternative to placement in an ICF/MR. The medical eligibility requirements for the MR/DD Waiver Program are the *same* requirements for placement in an ICF/MR. *See* 42 U.S.C. § 1396a (c) (1); 42 CFR § 441.301(b) (1) (iii), 42 C.F.R. §§1010 (2006), 483.440 (1995); Chapter 500, §503.1, *WV Medicaid MR/DD Waiver Policy Program Manual,* (BOR Hrg. Exh. 12). *See also, Medicaid Letter Number 97-10, Guidelines Regarding What Constitutes an*

ICF/MR Level of Care Under a Home and Community-Based Services Waiver (March 10, 1997 (Exh. A, attached to DHHR's Cir. Ct. Mem.*)*.

Medical Eligibility Requirements Of The MR/DD Waiver Program

Under State Policy and federal regulations, the eligibility group for the MR/DD Waiver Program includes individuals diagnosed with mental retardation and or "related conditions." *WV Medicaid MR/DD Waiver Policy Program Manual,* Chapter 500, §503.1; 42 C.F.R. §§435.1010 (2006), 483.440.

Under the State Medicaid MR/DD Waiver Policy and federal regulations, "persons with related conditions" means

> individuals who have a severe, chronic disability that meets *all* of the following conditions:
>
> (1) *Is attributable to* –
> (a) Cerebral palsy or epilepsy; or
> (b) Any other condition, other than mental illness, found to be closely related to mental retardation because this condition results in impairment of general intellectual functioning or adaptive behavior similar to that of mentally retarded persons, and requires treatment or services similar to those required for these persons.
> (2) It is manifested before the person reaches age 22.
> (3) It is likely to continue indefinitely.
> (4) It *results in* substantial limitations in three or more of the following areas of major life activity:
> (1) Self-care.
> (2) Understanding and use of language.
> (3) Learning.
> (4) Mobility.
> (5) Self-direction.
> (6) Capacity for independent living."

WV Medicaid MR/DD Waiver Manual §503.1; 42 C.F.R. §§ 435.1010 (2006), 483.440(a).

Federal law does not define "severe" except in the context of 42 C.F.R. §435.1010 (above). Nor does federal law define "substantial limited functioning." Thus, States have some

discretion in defining what constitutes a "severe" medical impairment and the level of functional limitation required to meet the eligibility requirements of the State's MR/DD Waiver Program. 42 U.S.C. §1396a, 42 C.F.R., Subpart A, § 430.0. As noted, Title XIX requires States to adopt "reasonable standards... for determining eligibility." 42 U.S.C. § 1396a (a) (17).

The *Policy Manual* does not define "severe." The DHHR uses a functional approach in assessing the threshold determination of whether a "related condition" is "severe." For example, with regard to cerebral palsy, DHHR looks for documentation from the treating physician, psychologists, therapists, educators, and other experts, that describes what part of the body is involved, the percentage of body involvement and the degree of limitation in ability to ambulate, perform self-care and speak. The assumption is that an individual with "severe cerebral palsy" would likely exhibit substantial functional limitations in the life areas of mobility, self-care and/or expressive and receptive language. *5-31-07 BOR TR 7-8.*

The *Policy Manual at* §503.1, defines "substantial limited functioning" as follows:

> Substantial limits is defined on standardized measures of adaptive behavior scores three (3) standard deviations below the mean or less than 1 percentile when derived from non MR normative populations or in the average range or equal to or below the seventy fifth (75) percentile when derived from MR normative populations. The presence of substantial deficits must be supported by the documentation submitted for review, i.e., the IEP, Occupational Therapy evaluation, narrative descriptions, etc.

This definition was approved by CMS, the federal agency overseeing the Medicaid Program and, therefore, is entitled to a presumption of reasonableness. *Hobbs v. Zenderman,* 542, F.Supp.2d. 1220, 1228 (2008), citing, *Morenz v. Wilson-Coker*, 415 F.3d 230, 235 (2d Cir. 2005).

The "treatment or services required" for individuals with mental retardation or

related developmental disabilities is the standard for "active treatment in intermediate care facilities for the mentally retarded under 42 C.F.R. §483.440(a), which provides that:

> 1. Each client must receive a continuous active treatment program, which includes aggressive, consistent implementation of program of specialized and generic training, treatment, health services and related services described in this subpart, that is directed toward -
>
> i. The acquisition of behaviors necessary for the client to function with as much self determination and independence as possible, and
>
> ii. The prevention or deceleration of regression or loss of current optimal functional status.
>
> 2. Active treatment *does not* include services to maintain generally independent clients who are able to function with little supervision or in the absence of a continuous active treatment program. (emphasis added)

Title 42 CFR §435.1010 defines "institution for the mentally retarded or persons with related condition" as:

> An institution. . . that - (a) is primarily for the diagnosis, treatment, or rehabilitation of the mentally retarded or persons with related conditions; and (b) provides, in a protected residential setting, ongoing evaluation, planning, *24-hour supervision*, coordination, and integration of health or rehabilitative services to help each individual function at his greatest ability.

(emphasis added). *Accord WV Medicaid MR/DD Policy §503.1.*

State Policy also requires that the applicant's evaluating psychologist indicate in the documentation submitted with the application that "active treatment" is required and recommend at an ICF/MR level of care for the eligible diagnosis. *§503.1 MR/DD Waiver Policy. See also Chapter 511, ICF/MR Services, §511.5.4.*

The burden of demonstrating medical eligibility is on the applicant. *WV Medicaid MR/DD Waiver Policy Program Manual,* Chapter 500, §503.1. *See also, Lavine v. Milen,* 424

U.S. 577, 584 (1976)(In general, the "normal assumption [is] that an applicant is not entitled to benefits unless and until he proves his eligibility.")

In applying these rules and principles to Wysong's case, it is clear that the Circuit Court committed reversible error.

A. The Circuit Court Committed Error in Concluding That Wysong's Cerebral Palsy Was "Severe."

The focus of Matthew Wysong's medical eligibility determination is his diagnosis of cerebral palsy as a "related condition." *4-1-08 Order ("Order"), Conc. 2.* Cerebral palsy is defined by *Stedman's Medical Dictionary* (26th Ed.,1995) at 1285 as a "defect of motor power and coordination related to damage of the brain."

To meet the requirements of the MR/DD Waiver Program, Wysong is required to demonstrate that his cerebral palsy is "severe..." *WV Medicaid MR/DD Waiver Manual* §503.1; 42 C.F.R. §§ 435.1010 (2006), 483.440(a).

In its Order, at Conclusion Of Law #3 at 11-12, the Circuit Court held:

> Further, this Court concludes that Matthew Wysong's condition of cerebral palsy is "severe." Although this term is not defined in the MR/DD Waiver Manual, both Ms. Workman, the DHHR psychologist, and Ms. Kiser-Griffith, Mr. Wysong's evaluating psychologist, testified that Matthew Wysong's condition caused him significant impairments, was more than just a slight abnormality.

In reaching this conclusion, the Circuit Court came up with its own medical diagnosis of "severe cerebral palsy" based on his personal opinion. The Circuit Court's definition of "severe cerebral palsy" is not within the context of the Medicaid statute or the regulatory scheme of which it is a part. In reaching its conclusion, the Circuit Court disregarded the medical and psychological evidence before it on review (which indicated Wysong's cerebral palsy was not

severe), relied on functional limitations that do not result from the eligible diagnosis (cerebral palsy) and irrelevant testimony.

The Legislature gave the DHHR the authority to determine medical eligibility questions relating to Medicaid Programs. W.Va. Code § 9-2-6 (2005). The Circuit Court does not have specific competence to make a medical diagnosis or to determine the level of impairment related to a medical diagnosis. The West Virginia Supreme Court of Appeals has never spontaneously come up with a medical diagnosis of anyone. There is no standard of review that would allow that to occur.

The State Policy and federal regulations adopt the functional approach to determining the effects of medical impairments as "related conditions." They require the applicant to demonstrate that he has an eligible diagnosis, that it is severe, chronic, that the eligible diagnosis with concurrent adaptive deficits were manifest before the age of 22, that the eligible diagnosis results in substantial limited functioning in at least three of the six major life activities, and requires active treatment at the intermediate institutional level of care for persons diagnosed with mental retardation and/or "related conditions." *Id.* If the eligible medical impairment is not severe enough to substantially limit the claimant, by definition, it does not qualify him for participation in the MR/DD Waiver Program. Moreover, it expressly gives the DHHR the authority to place the burden of showing a medically determinable impairment on the claimant. In addition, the severity requirement is consistent with restriction of MR/DD Waiver Program eligibility to claimants whose medically impairments resulting from the eligible diagnosis require placement in an ICF/MR. If a claimant is unable to show he has an eligible diagnosis that results in substantial limited functioning—i.e., that is "severe," he is not eligible for benefits and there is no reason for the BMS to consider whether he requires an ICF/MR level of care.

The DHHR's approach to the determination of "severe impairment" is similar to the approach used by the school systems in Virginia and West Virginia. As noted, Wysong had been placed in "Mild Impairment" classrooms during his first eight years of public schooling.

Thus, the DHHR's approach to a determination of "severe" is a reasonable standard and should not have been disregarded by the Circuit Court. Title XIX of the Social Security Act, 42 U.S.C. § 1396a (a) (17); *see also*, W.Va. Code §9-2-6 (2005).

It is reasonable that an individual diagnosed with "severe cerebral palsy" would likely exhibit substantial limited functioning in the life activity of mobility. Yet, the Circuit Court did not find that Wysong's cerebral palsy resulted in substantial limited functioning in the life activity of mobility. *See Order generally.* Nor did the Circuit Court find that Wysong has substantial limited functioning in his ability to speak or to learn. *Id.* Moreover, Wysong's treating physician did not diagnose his cerebral palsy as "severe." His narrative notes do not support such a finding as they state that Wysong is ambulatory, continent, feeds himself, and has sufficient fine motor ability to take care of most activities. *BOR Hrg. Exh.* 6; *5-31-07 TR 7-8, 12-13.* Also, Wysong's psychologist testified that Wysong's impairment in the life activity of mobility was "not severe." *8-01-07 TR 34.* She confirmed that Wysong was ambulatory, was able to express himself and that he could physically perform basic self-care activities like feeding himself, brushing his teeth. *Id. at 25, 27.* The psycho-educational evidence reveals that Wysong can read and write and participated, "with some success," in WV Rehab in Institute, West Virginia. In order to attend WV Rehab, a participant is required to be able to take care of his activities of daily living, such as toileting, bathing, eating. *BOR Hrg. Exhs. 7, 8; 5-31-07 TR 13.*

This evidence was relevant and material to the issue of whether Wysong's cerebral palsy was "severe:" therefore, it was error for the Circuit Court to disregard it.

While the Circuit Court held that Wysong has substantial limited functioning in the life activities of self-direction, capacity for independent living and self-care (*Order, Concls. 4-7 at 13*), there is no testimony or evidence that Wysong's cerebral palsy "resulted in" these areas of limitation, as required by federal and state law. *§503.1 MR/DD Waiver Policy*; 42 C.F.R. § 435. 1010. Thus, the Circuit Court's findings of these limitations have little, if any, relevance to the issue of whether Wysong's eligible diagnosis (cerebral palsy) is "severe."

The Circuit's Court's conclusion is based on a red herring – a fallacy in which an irrelevant topic is presented in order to divert attention from the original issue. Wysong's counsel had asked Ms. Workman, the BMS consultant, whether Wysong's "condition is more than just a slight abnormality *when compared to the general population.*" *5-31-07 TR 16.* (emphasis added). Counsel did not specify what "condition" he was referring to. *Id.* Similarly, he asked Sandi Kiser-Griffith to "compare [Wysong's] GAF ("Global Assessment of Functioning") to the general population." *8-1-07 TR 14-15.*

Neither comparison is relevant or material to the original issue – i.e., whether Wysong has "severe cerebral palsy" within the context of the medical eligibility requirements for the MR/DD Waiver Program.

Wysong's GAF score is not a measure of the severity of his cerebral palsy. The GAF is a numeric scale (0 through 100) used by mental health clinicians and doctors to rate the social, occupational and psychological functioning of adults. This is reported on psychological evaluations as "Axis V."[12] The scale is presented and described in the DSM-IV-TR on page 32. The instructions specify, "Do not include impairment in functioning due to physical (or environmental) limitations." *DSM-IV-TR (4th Ed. 2000).*

[12] A physical diagnosis, such as cerebral palsy, is reported on Axis III.

Moreover, Wysong's psychologist, Sandi Kiser-Griffith testified that his functional limitation due to cerebral palsy was not severe. *TR at 34.* The focus of her testimony was not his cerebral palsy and his functional limitations resulting from cerebral palsy. *Id. See also 8-01-07 TR 40-41.* Rather, it was her diagnosis of personality disorder/NOS and his recent frontal lobe surgery. *Id.*

The Circuit Court's comparison of Wysong's adaptive deficits to the general population is error as is the Circuit Court's Finding #15 at 5-6 that "... The ABS instrument is used to determine how deficient an individual is in his or her major life activities as compared to other individuals, *either with or without* mental retardation or a related condition... " *Order, Finding 15, Conc. 3* (emphasis added).

The Circuit Court's finding is not supported by the American Association on Mental Retardation's publication regarding the ABS instrument. *See, AAMR Adaptive Behavior Scale – School, Examiner's Manual, Chp. 4, Normative Procedures at 25 -32* (2nd Ed. 1993). Moreover, it is contradicted by Kiser-Griffith's testimony that she "does not know what good it does" to assess a non-MR adult with MR norms. *8-01-07 BOR Hrg. TR at 38 – 39.*

Indeed, for standard scores to have any meaning, the individual must be compared to other similar individuals, such as those in the same age group with the same diagnostic assignments. Using the wrong norm groups would be like comparing a six year old to a twenty year old; that would be of no value. Using adult MR norms for an adult who is not MR, does not provide you with any meaningful information with regard to the MR/DD Waiver Program eligibility criteria. In short, Wysong's assessment on the ABS which resulted from the use of MR norms can not be certified as an accurate assessment of his functional limitations because he

does not share the demographic characteristics of the normative sample. *Id.*[13] Also, Wysong's assessment on the ABS using MR norms is discrepant with the narrative notes of the treating physician, examining psychologist, social history and other psycho-educational assessments in the record which indicate a higher level of functioning.

In sum, in concluding that Wysong has "severe cerebral palsy," the Circuit Court was not conducting an "independent review" because in making its determination, it was not reviewing evidence but was creating it.

B. The Circuit Court Committed Error In Its Conclusion That Wysong Meets the Functionality Requirement For Medical Eligibility.

State and federal law require that the applicant demonstrate he has "a severe, chronic disability that meets *all* of the following conditions ... (d) It *results in* substantial limited functioning in three or more [of the major life activities]." 42 C.F.R. §435.1010; WV *Medicaid MR/DD Waiver Policy Program Manual,* §503.1.

The Circuit Court held that Wysong demonstrated substantial limited functioning in the three life activities of capacity for independent living, self-direction and self-care. *Order, Concls. 4-7.* However, there was no finding by the Circuit Court that Wysong's cerebral palsy "resulted in" these functional limitations. *Id. (see generally).* The Circuit Court's own description of the adaptive deficits it identified shows **no nexus** between cerebral palsy and the deficit. The record does not support such a nexus.

Conclusion #5 of the Circuit Court's Order at 13 provides:

> Both Ms. Workman and Ms. Kiser-Griffith testified that Matthew Wysong's ABS scores in areas related to independent living were qualifying scores because they

[13] Kiser-Griffith's allegation that she used MR norms to assess Wysong because the State requires it is false. *8-01-07 BOR* Hrg. *TR at 30.* There is no such requirement in the Policy. *BOR Exh. 12.*

> met the MR/DD Waiver Program requirement of "average range" when compared to individuals with mental retardation. (TR II 23).

"Capacity for independent living" concerns home living, social skills, health and safety, community use and leisure. *§ 503.1, MR/DD Waiver Manual.* Wysong's ABS scores in this area are not relevant because there is no evidence that Wysong's cerebral palsy "results in substantial limited functioning" in this life activity. The diagnosis of cerebral palsy and Wysong's functional limitations resulting from cerebral palsy were not the focus of Ms. Kiser-Griffith's testimony that the Circuit Court relied on. Neither Ms. Workman nor Ms. Kiser-Griffith testified that Wysong's lack of capacity for independent living" was the result of his cerebral palsy.

Regarding its conclusion that Wysong demonstrated "substantial limited functioning" in the life activity of "self-direction," *Order, Concl. 5*, the Circuit Court held:

> Although Ms. Workman testified that Matthew did not have a limitation of function in this area because he did not "just sit and do nothing for hours at a time," *this Court finds that Matthew's inability to self-initiate a wide range of daily activities*, such as personal hygiene and handling money, actually do constitute a substantial limitation of "self-direction." (emphasis added).

Not only is this a gross misstatement of Ms. Workman's testimony,[14] neither Ms. Neither Workman nor Ms. Kiser-Griffith testified that Wysong's lack of self-direction *results from* his cerebral palsy. And there is no such evidence in the record. Moreover, lack of self-initiative is not relevant in considering *functional* limitations resulting from cerebral palsy.

Regarding its conclusion that Wysong demonstrated "substantial limited functioning" in the life activity of "self-care," *Order, Concl. 7*, the Circuit Court held:

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[14] Ms. Workman pointed out numerous examples of activities that Wysong initiates and choices that he makes on a daily basis as her reason for why Wysong does not have a substantial deficit in this area. *5-31-07 TR 14.*

> Ms. Workman testified that Matthew did not have a substantial limitation in this area because he was physically able of performing self-care activities; *however, even if Matthew can perform some activities, it is clear that Matthew Wysong has a deficit in the ability to self-initiate these activities and that he can not perform these activities without assistance and training. (emphasis added).*

Again, the Circuit Court's holding is in error because (1) physical ability to perform self-care activities is a proper focus of whether cerebral palsy "results in substantial limitations" in at least three of the six major life activities, 42 C.F.R. § 435.1010, (2) a need for prompting and supervision does not meet the statutory medical eligibility requirement, 42 C.F.R. §483.440(b), and (3) there is no evidence that Wysong's lack of self-initiative is the result of his cerebral palsy.

Thus, in making the determination that Wysong satisfied the functionality requirement, the Circuit Court was not conducting an "independent review" because it disregarded the plain statutory language that the claimant demonstrate he has "a severe, chronic disability that meets *all* of the following conditions ... (d) It *results in* substantial limited functioning in three or more [of the major life activities]." 42 C.F.R. §435.1010. In so doing, the Circuit Court created an overly inclusive standard of medical eligibility for participation in the MR/DD Waiver Program.

C. The Circuit Court Committed Error In Its Conclusion That Wysong Meets The Level of Care Requirement For Medical Eligibility.

Because the Circuit Court's conclusions that Wysong's cerebral palsy is "severe" and results in substantial limited functioning are clearly erroneous, as a matter of law, Wysong does not meet the level of care requirement. 42 C.F.R. § 1010 requires that "all" of its conditions be met.

In its Order, at Conclusions 11 and 12 at 14-15, the Circuit Court held:

> As demonstrated with regard to the active treatment requirement, Ms. Kiser-Griffith wrote in her report and testified to the specific instruction, services, assistance, and supervision that Matthew Wysong requires (ftn. omitted). Her report and testimony demonstrate that Matthew Wysong does require active treatment, and thus he does meet the requirements for ICF/MR level of care.
>
> Without the services and training and supervision which Ms. Kiser-Griffith testified that Matthew needs, he certainly will not "learn new skills" or "increase independence in activities of daily living." Although Ms. Workman testified that Matthew did not meet the ICF/MR level of care because he did not need 24-hour supervision, this Court finds that DHHR regulations do not require 24-hour care and supervision for participation in the MR/DD Waiver Program. Further, if Matthew Wysong were not living at home with his mother's care currently, he would have to be placed in a 24-hour care setting with services, training and supervision.

In reaching these conclusions, the Circuit Court completely ignored the State Policy requirement that the applicant's evaluating psychologist recommend "active treatment" at the ICF/MR level of care and services, *§503.1 MR/DD Waiver Policy. See also Chapter 511, ICF/MR Services, §511.5.4,* and the evaluating psychologist's testimony to the contrary. *8-01-07 TR 45-47.*

Ms. Kiser-Griffith testified that the training she recommended "**doesn't**" translate into a need for ICF/MR services and she "**did not**" recommend an ICF/MR level of care. *Id.* The question had been squarely put to her by the State Hearing Officer. *Id.* There is no question that she did not recommend the level of care and services provided in an ICF/MR for Wysong. *Id.*

In addition, the Circuit Court disregarded plain statutory language, State Policy and a CMS directive that participation in the MR/DD Waiver Program requires the **same level of care and services** that are provided in an ICF/MR and that "**an ICF/MR provides 24 hour supervision, training and supports.**" §503.1 *MR/DD Waiver Policy Manual;* 42 C.F.R. §§441.301 (b)(1)(iii)("*but for the provision of such services* the individuals would require the level of care in an Intermediate Care Facility for the Mentally Retarded"); 435.1010 (defining

"institution for the mentally retarded or persons with related conditions; "active treatment"); 483.440(a) ("active treatment" standard); 483.440(b)("active treatment" does not include services to maintain generally independent clients who are able to function with little supervision or in the absence of a continuous active treatment program"); *Medicaid Letter Number 97-10, Guidelines Regarding What Constitutes an ICF/MR Level of Care Under a Home and Community-Based Services Waiver (*providing that the level of care requirements for medical eligibility for placement in ICF/MR and participation in MR/DD Waiver Program are the same).

Furthermore, the Circuit Court disregarded other testimony and documentary evidence demonstrating that Wysong failed to meet the "active treatment" standard, 42 C.F.R. §483.440(a).

Ms. Workman testified that the "Active Treatment" checklist in the psychological evaluation does not support the need for "active treatment" at the ICF/MR Level of Care for Wysong's eligible condition of cerebral palsy. *5-31-07 TR 14.* She pointed out that, not only did the evaluating psychologist not recommend "active treatment" an ICF/MR level of care, the answers of the evaluating psychologist indicate that Wysong does not need aggressive training to learn new activities; that he can generalize from things he has learned and can learn from one activity to another. Also, the MR/DD Waiver Program requires a 24 hour program of intense instruction, training and supervision to learn the most basic of human activities and the answers did not indicate that Wysong needs these services and level of care. *Id.* Individuals, like Wysong, who need only prompting and supervision, do not meet the "active treatment" requirement. 42 C.F.R. §483.440(b).

Ms. Workman also testified that the narrative notes of Wysong's treating physician do not support the need for "active treatment" at the ICF/MR level of care for Wysong's eligible

condition of cerebral palsy because it indicates that his cerebral palsy is not severe. The narrative notes demonstrate that Wysong does not have substantially limited functioning in mobility, self-care, expressive and receptive language, and learning. *5-3-07 TR 7-8.*

Little, if any, weight should be given to the fact that Dr. Baker checked a box on the DD-2A that Wysong's condition requires an ICF/MR level of care. *See, WVRE, 702, 703.* He did not testify at the administrative hearings. Not only do his narrative notes contradict his conclusion, there is nothing in the record that indicates that Dr. Baker, an osteopath, has any special knowledge or expertise, by education, experience or training, to make a functional assessment of Wysong for placement in an ICF/MR and/or in the Waiver Program. Functional assessments are based on "standardized measures of adaptive behavior scores..." This requires expertise in the field of psychology. Also, there is nothing in the record that indicates that Dr. Baker has knowledge of the WV Medicaid MR/DD eligibility criteria, the level of care and services provided in an ICF/MR. Thus, there is no basis for his opinion. *Id.*

Because the Circuit Court's conclusions are premised on an erroneous foundation, its opinion that Wysong would require placement in an ICF/MR but for his mother's care is also erroneous. Also, there is no evidence that Wysong's mother's care is equivalent to the level of care and services provided to individuals with mental retardation and/or "related conditions" in an ICF/MR. It is a disservice to Matthew Wysong, given his accomplishments, to say that he would be placed in an ICF/MR but for his mother's care. Many individuals who are afflicted with cerebral palsy are active functional members of society and obviously do not require an intermediate institutional level of care.

D. The Findings And Conclusions Of The State Hearing Officer Should Be Re-Instated Under Any Standard Of Review.

The diagnostic medical eligibility criteria were created by the federal Medicaid Agency (CMS) and the State Medicaid Agency (BMS) for the DHHR. Medicaid law is complex, and the day to day application of the Medicaid statute has been largely left to the administrative agencies. Thus, deference to the construction of the Medicaid regulations should be given to the presumed experts in the field who are employed by the DHHR to make medical eligibility determinations. *Hobbs ex rel. Zenderman*, 542 F.Supp.2d 1220, 1228 (2008), *citing Morenz v. Wilson-Coker*, 415 F.3d 230, 235 (2d. Cir. 2005).

Morevoer, the West Virginia Legislature has conveyed its intention, through statutory language, that the DHHR is to be accorded deference on questions relating to medical eligibility. The Legislature created the DHHR and assigned to the Secretary of the DHHR the sole authority to accept state appropriations and federal grants subject to the provisions of state and federal laws and regulations, to decide eligible groups, types and ranges of services and administrative and operating procedures, including adjudicatory decision making. W.Va. Code §9-2-6 (2005). *See also*, 42 C.F.R. , Subpart A, §430.0 ("Within broad Federal rules, each State decides eligible groups, types and range of services, and administrative and operating procedures"); 42 C.F.R. 431.10 (requirement for designation of a single State agency to administer or supervise the State plan, make rules and regulations that it follows in administering the plan or that are binding upon local agencies that administer the plan, determine eligibility; prohibition against delegating to other than its own officials, authority to exercise administrative discretion in the administration or supervision of the plan, issue policies, rules and regulations on program matters).

The ability of the Circuit Court to make an "independent review" does not authorize a circuit court to make new medical diagnostic eligibility criteria which is what the Circuit Court in the present case did.

Moreover, in this case, the true fact finder was the State Hearing Officer of the Board of Review, before who the parties appeared and an evidentiary hearing was conducted and who has experience and expertise in this area. *State ex rel. K.M., et al., v. WVDHHR, et al.*, 212 W. Va. 783, 799, 575 S.E.2d 393, 411 (2002). The review by the Circuit Court was solely upon the administrative record. The Circuit Court should have applied a "*de novo*" standard to questions of law and a "clearly erroneous" standard to the Hearing Officer's findings of fact. In failing to do so, the Circuit Court violated the Separation of Powers Doctrine, W.Va. Const. Article V, §1. *Frymier-Halloran v. Paige*, 193 W. Va. 687, 458 S.E.2d 780 (1995). *See also, Danielley v. City of Princeton*, 113 W.Va. 252, 167 S.E. 620 (1933); *In re Tax Assessment Against Am. Bituminous Power Partners*, 208 W.Va. 250, 539 S.E.2d 757 (2000). *Accord, State ex rel. Prosecuting Attorney of Kanawha County, West Virginia*, 2008 WL 4867218 at 9, ftn. 17 (this Court recognized *Danielly* and *Frymier-Halloran* as exceptions where review by a petition for a *writ of certiorari* was authorized, but where *de novo* review was prohibited).

In *Danielly*, the Court addressed a statute which permitted courts to review *de novo* decisions by the State Water Commission. The Court held that the statute was unconstitutional because it would authorize a circuit court to create a water pollution system if it did not approve of the system created by the State Water Commission. The Court rejected such authority being given to circuit courts because "[a] review of the system (for the regulation of the pollution) adopted by the commission and the approval of that or some other system by the court would

require the court itself to exercise discretion; *i.e.* executive power." 113 W.Va. at 255, 167 S.E. at 622.

In re Tax Assessment Against Am. Bituminous Power Partners, 208 W.Va. 250, 539 S.E.2d 757 (2000), this Court recognized that W.Va. Code § 11-3-25 only permits a circuit court to review a county commission's tax ruling based upon the record created at the county commission hearing).

In *Frymier-Halloran v. Paige*, 193 W.Va. 687, 458 S.E.2d 780 (1995), this Court held that circuit courts may not conduct *de novo* review of an appeal from a decision by the Tax Commissioner. This Court held that " once the legislature creates an administrative agency and assigns adjudicatory decision making to that agency, then Courts must defer to its decisions and cannot review factual determinations *de novo*." Otherwise, the court would violate the Separation of Powers Doctrine, W.Va. Const. Article V, §1.

In the present case, if the circuit court of Kanawha County is permitted to review *de novo* the findings of fact of the State Hearing Officer, that would authorize the circuit court to create a medical eligibility policy if it did not approve of the policy created by CMS and the Secretary of the DHHR. This Court should reject such authority being given to the circuit court because a review of the State Medicaid Policy (for the regulation of the MR/DD Waiver Program) adopted by the Secretary and the approval of that or some other policy by the court would require the court itself to exercise discretion; i.e., executive power. *Danielly*, supra.

This Separation of Powers issue relative to the scope of review was not addressed by the Court in *Ginsberg, supra*. Also, *de novo* review, in *Ginsberg*, would have been appropriate in the circuit court regardless of whether the case was before the Circuit Court on appeal or on *writ of certiorari* because questions of law were present; in particular, whether the State Hearing

Officer failed to consider federal regulations defining "incapacity" for purposes of the AFDC Program and whether the manner in which he rendered his decision complied with federal and state law. 169 W.Va. at 167-71; 286 S.E.2d at 279-281. The Court held that because the Hearing Officer failed to consider federal regulations defining "incapacity," his findings and conclusions were "clearly erroneous." 167 W.Va. at 168; 286 S.E.2d at 280.

This Court should apply the same level of scrutiny to the Circuit Court's decision in the present case. It is needed to assure that the standards which the Circuit Court uses to define medical eligibility for the MR/DD Waiver Program and the manner in which the Circuit Court decides medical eligibility are consistent with federal and state law. *Ginsberg*, supra.

In the present action, because the Circuit Court failed to consider all of the elements of federal regulations and State Policy defining medical eligibility, its findings and conclusions are clearly erroneous. The findings and conclusions of the State Hearing Officer are based on the correct legal standards and are amply supported by the evidence. Thus, the Hearing Officer's findings of fact should be re-instated by this Court under any standard of review. *Id.*; *Frymier-Halloran, supra, State ex rel. Prosecution Attorney, supra.*

VI. Conclusion and Relief Prayed For

As stated above, the Circuit Court, in setting aside the findings and conclusions of the State Hearing Officer, created its own medical eligibility standard which would result in the liberal award of benefits to individuals who fail to meet the medical eligibility standard required by federal and State law. By so erring, the Circuit Court's review of the evidence amounted not to an "independent review," but simply a reconsideration under erroneous criteria. The true fact-finder in this proceeding was the State Hearing Officer. He applied the correct legal standards

and his findings and conclusions are amply supported by the evidence of record. The Circuit Court ignored the Hearing Officer's findings and conclusions and created his own medical diagnosis that was contradicted by the record. Therefore, the ruling of the Circuit Court constituted a substitution of judgment rather than an "independent review" as contemplated by the law. Inasmuch as the findings and conclusions of the Hearing Officer were amply supported by law and facts, the decision of the Hearing Officer should be re-instated under any standard of review. Accordingly, Secretary Walker prays that this Court reverse the April 7, 2008 Order of the Circuit Court, re-instate the decision of the State Hearing Officer and provide the DHHR such further relief as this Court deems appropriate.

Respectfully submitted,

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SUPREME COURT OF APPEALS OF WEST VIRGINIA

MATTHEW WYSONG,
by his mother, Mary L. Ramsey,

Petitioner Below, Appellee,

Vs.)

Supreme Court No. 34594
(Civil Action 07-AA-152 Below)

MARTHA WALKER, in her official capacity as Secretary of the West Virginia Department of Health and Human Resources; and Ray Burl Woods, in his capacity as State Hearing Officer for the West Virginia Department of Health and Human Resources,

Respondents Below, Appellants.

CERTIFICATE OF SERVICE

I, Mary McQuain, Assistant Attorney General and counsel for the Appellant, Martha Walker, Secretary, West Virginia Department of Health and Human Resources, hereby certify that I have served a true and accurate copy of the foregoing "Brief of Appellant Martha Walker, Secretary, West Virginia Department of Health and Human Resources,' by depositing said copy in the United States mail, with first-class postage prepaid, this 18th day of December, 2008, to the following persons, addressed as follows:

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